



Draft Final Audit Report of the Audit Division on O'Malley for President

(May 15, 2015 – December 31, 2016)

Why the Audit Was Done

Federal law requires the Commission to audit every political committee established by a candidate who receives public funds for the primary campaign.¹ The audit determines whether the candidate was entitled to all of the matching funds received, whether the campaign used the matching funds in accordance with the law, whether the candidate is entitled to additional matching funds, and whether the campaign otherwise complied with the limitations, prohibitions, and disclosure requirements of the election law.

Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

About the Campaign (p. 2)

O'Malley for President is the principal campaign committee for Martin Joseph O'Malley, a candidate for the Democratic Party nomination for the office of President of the United States. The Committee is headquartered in Baltimore, Maryland. For more information, see the chart on the Campaign Organization, p. 2.

Financial Activity (p. 3)

• Receipts

○ Contributions from Individuals	\$ 4,574,259
○ Matching Funds Received	1,088,929
○ Loans Received	500,000
○ Contributions from Other Political Committees	115,002
○ Offsets to Operating Expenditures	82,577
Total Receipts	\$ 6,360,767

• Disbursements

○ Operating Expenditures	\$ 5,707,052
○ Loan Repayments	500,000
○ Contribution Refunds	78,127
○ Other Disbursements	650
Total Disbursements	\$ 6,285,829

Findings and Recommendations (p. 4)

- Net Outstanding Campaign Obligations (Finding 1)
- Payments of Non-Qualified Expenses (Finding 2)
- Failure to Itemize Offsets to Expenditures (Finding 3)
- Reporting of Debts and Obligations (Finding 4)
- Stale-Dated Checks (Finding 5)

¹ 26 U.S.C. §9038(a).

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DRAFT



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Part I

Background

Authority for Audit

This report is based on an audit of O'Malley for President (OMFP), undertaken by the Audit Division of the Federal Election Commission (the Commission) as mandated by Section 9038(a) of Title 26 of the United States Code. That section states, "After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received [matching] payments under section 9037." Also, Section 9039(b) of the United States Code and Section 9038.1(a)(2) of the Commission's Regulations state that the Commission may conduct other examinations and audits from time to time as it deems necessary.

Scope of Audit

This audit examined original reports filed by OMFP prior to the audit notification letter dated November 30, 2016.² The audit also examined the original filings of the 2016 December Monthly and Year-End Reports. The following areas were covered by this audit:

1. the campaign's compliance with limitations for contributions and loans;
2. the campaign's compliance with the limitations for candidate contributions and loans;
3. the campaign's compliance with the prohibition on accepting prohibited contributions;
4. the disclosure of contributions and loans received;
5. the disclosure of disbursements, debts and obligations;
6. the consistency between reported figures and bank records;
7. the accuracy of the Statement of Net-Outstanding Campaign Obligations;
8. the campaign's compliance with spending limits;
9. the completeness of records; and
10. other campaign operations necessary to the review.

Inventory of Campaign Records

The Audit staff routinely conducts an inventory of campaign records before it begins audit fieldwork. OMFP's records were materially complete and fieldwork commenced immediately.

² Subsequent to the audit notification, OMFP filed amendments to these reports. These amendments were given a limited review to determine if issues noted in the Preliminary Audit Report were corrected by OMFP.

Part II

Overview of Campaign

Campaign Organization

Important Dates	
• Date of Registration	May 29, 2015
• Eligibility Period ³	November 19, 2015 – February 1, 2016
• Audit Coverage ⁴	May 15, 2015 – December 31, 2016
Headquarters	
Baltimore, Maryland	
Bank Information	
• Bank Depositories	One
• Bank Accounts	Four (1 checking; 1 merchant processing; 1 conduit income; and 1 reserve)
Treasurer	
• Treasurer When Audit Was Conducted	Terry Lee Lierman
• Treasurer During Period Covered by Audit	Terry Lee Lierman
Management Information	
• Attended Commission Campaign Finance Seminar	No
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

³ On November 5, 2015, the Candidate submitted a signed letter (dated November 2, 2015), to the Commission seeking to become eligible to receive Presidential primary matching funds and agreeing that he and his authorized committee would comply with the conditions set forth in 11 CFR §9033.1(b). A threshold submission was submitted on November 4, 2015, and the Commission certified the Candidate as eligible to receive matching funds on November 19, 2015. The period during which the Candidate was eligible for matching funds ended on February 1, 2016, the Candidate's date of ineligibility.

⁴ The Audit staff conducted limited reviews of receipts and expenditures after December 31, 2016, to determine whether the Candidate was eligible to receive additional matching funds.

Overview of Financial Activity (Audited Amounts)

Cash-on-hand @ May 15, 2015	\$ 0
Receipts	
○ Contributions from Individuals ⁵	4,574,259
○ Matching Funds Received ⁶	1,088,929
○ Loans Received	500,000
○ Contributions from Other Political Committees	115,002
○ Offsets to Operating Expenditures	82,577
Total Receipts	\$ 6,360,767
Disbursements	
○ Operating Expenditures	5,707,052
○ Loan Repayments	500,000
○ Contribution Refunds	78,127
○ Other Disbursements	650
Total Disbursements	\$ 6,285,829
Cash-on-hand @ December 31, 2016⁷	\$ 92,369

⁵ OMFP received approximately 20,107 contributions from 20,011 individuals.

⁶ As of the Candidate's date of ineligibility, February 1, 2016, OMFP had received matching funds totaling \$946,365. OMFP received an additional \$142,564 by April 7, 2016, for a total of \$1,088,929.

⁷ OMFP filed comprehensive amended disclosure reports on January 31, 2017 along with the 2016 Year-End Report. These corrections created a mathematical discrepancy of \$17,431 in the audited reports pertaining to the ending cash-on-hand. See Scope of Audit, p. 1.

Part III

Summaries

Findings and Recommendations

Finding 1. Net Outstanding Campaign Obligations

The Audit staff's review of OMFP's financial activity through December 31, 2017, and estimated winding down costs indicated that the Candidate did not receive matching fund payments in excess of his entitlement.

In response to the Preliminary Audit Report recommendation, OMFP had no comments related to this matter. (For more detail, see p. 6.)

Finding 2. Payments of Non-Qualified Expenses

During audit fieldwork, the Audit staff's review of OMFP's disbursements indicated that OMFP spent \$39,834 on behalf of the O' Say Can You See Political Action Committee (OPAC). Since these funds were not spent in connection with the Candidate's nomination for election, they are considered non-qualified campaign expenses. The calculated repayment to the United States Treasury at a ratio of 23.37% is \$9,309. OMFP representatives explained that OMFP was aware during the campaign that these were not qualified campaign expenses and expected OPAC's reimbursement for these expenses. The Audit staff analyzed all documentation pertaining to these disbursements and subsequent reimbursements and confirmed that OPAC reimbursed OMFP in full. Since the public funds were restored as a result of the reimbursement, the Audit staff will recommend that the Commission make a determination that no repayment is owed to the U.S. Treasury.

In response to the Preliminary Audit Report recommendation, OMFP had no comments related to this matter. (For more detail, see p. 9.)

Finding 3. Failure to Itemize Offsets to Expenditures

The Audit staff reviewed vendor refunds OMFP disclosed on Schedule A-P, Line 20 (Offsets to Expenditures (Refunds, Rebates, etc.)) and determined that OMFP did not itemize 14 such refunds totaling \$8,582. Subsequent to the audit notification, OMFP filed amended reports and materially disclosed these receipts. Since OMFP's corrective action occurred after audit notification, the matter is included in this audit report.

In response to the Preliminary Audit Report recommendation, OMFP had no comments related to this matter. (For more detail, see p. 11.)

Finding 4. Reporting of Debts and Obligations

During audit fieldwork, the Audit staff noted that OMFP failed to disclose debts and obligations to one vendor totaling \$156,019.

In response to the Preliminary Audit Report recommendation, OMFP amended its disclosure reports to materially correct the disclosure of debts and obligations on Schedule D-P (Debts and Obligations). (For more detail, see p. 13.)

Finding 5. Stale-Dated Checks

The Audit staff identified 12 stale-dated checks totaling \$15,197 issued by OMFP.

In response to the Preliminary Audit Report, OMFP made a payment of \$15,197 to the U.S. Treasury. (For more detail, see p. 14.)

Summary of Amounts Owed to the United States Treasury

• Finding 2. (p. 9)	Payments of Non-Qualified Expenses	\$ 0
• Finding 5. (p. 13)	Stale-Dated Checks	\$15,197
Total Due U.S. Treasury		\$ 15,197

Part IV

Findings and Recommendations

Finding 1. Net Outstanding Campaign Obligations

Summary

The Audit staff's review of OMFP's financial activity through December 31, 2017, and estimated winding down costs indicated that the Candidate did not receive matching fund payments in excess of his entitlement.

In response to the Preliminary Audit Report recommendation, OMFP had no comments related to this matter.

Legal Standard

A. Net Outstanding Campaign Obligations (NOCO). Within 15 days after the candidate's date of ineligibility (see definition below), the candidate must submit a statement of "net outstanding campaign obligations." This statement must contain, among other things:

- The total of all committee assets including cash-on-hand, amounts owed to the committee and capital assets listed at their fair market value;
- The total of all outstanding obligations for qualified campaign expenses; and
- An estimate of necessary winding-down costs. 11 CFR §9034.5(a).

B. Date of Ineligibility. The date of ineligibility is whichever of the following dates occurs first:

- The day on which the candidate ceases to be active in more than one state;
- The 30th day following the second consecutive primary in which the candidate receives less than 10 percent of the popular vote;
- The end of the matching payment period, which is generally the day when the party nominates its candidate for the general election; or
- In the case of a candidate whose party does not make its selection at a national convention, the last day of the last national convention held by a major party in the calendar year. 11 CFR §§9032.6 and 9033.5.

C. Qualified Campaign Expense. Each of the following expenses is a qualified campaign expense.

- An expense that is:
 - Incurred by or on behalf of the candidate (or his or her campaign) during the period beginning on the day the individual becomes a candidate and continuing through the last day of the candidate's eligibility under 11 CFR §9033.5;
 - Made in connection with the candidate's campaign for nomination; and
 - Not incurred or paid in violation of any federal law or the law of the state where the expense was incurred or paid. 11 CFR §9032.9.

- An expense incurred for the purpose of determining whether an individual should become a candidate, if that individual subsequently becomes a candidate, regardless of when that expense is paid. 11 CFR §9034.4.
- An expense associated with winding down the campaign and terminating political activity. 11 CFR §9034.4(a)(3).

D. Entitlement to Matching Payments after Date of Ineligibility. If, on the date of ineligibility (see above), a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments for matchable contributions received and deposited on or before December 31st of the Presidential election year, provided that he or she still has net outstanding campaign debts on the day when the matching payments are made. 11 CFR §9034.1(b).

E. Value of Capital Assets. The fair market value of capital assets is 60% of the total original cost of the assets when acquired, except that assets that are received after the date of ineligibility must be valued at their fair market value on the date received. A candidate may claim a lower fair market value for a capital asset by listing the asset on the NOCO statement separately and demonstrating, through documentation, the lower fair market value. 11 CFR §9034.5(c)(1).

F. Winding Down Costs. A primary election candidate who does not run in the general election may receive and use matching funds after notifying the Commission in writing of the candidate's withdrawal from the campaign for nomination or after the date of the party's nominating convention, if the candidate has not withdrawn before the convention. A primary election candidate who runs in the general election must wait until 31 days after the general election before using any matching funds for winding down costs, regardless of whether the candidate receives matching funds for the general election. 11 CFR §9034.11(d).

Facts and Analysis

A. Facts

The Candidate's date of ineligibility (DOI) was February 1, 2016. The Audit staff reviewed OMEP's financial activity through December 31, 2016; analyzed actual and projected winding down costs;⁸ and prepared the Statement of Net Outstanding Campaign Obligations that appears on the next page.

⁸ The actual winding down costs were reviewed through April 30, 2018. The projected winding down costs were estimated through December 31, 2018.

O'Malley for President
Statement of Net Outstanding Campaign Obligations
As of February 1, 2016
Prepared May 25, 2018

Assets

Cash in Bank	\$ 181,638 [a]
Accounts Receivable	
Security Deposits	27,074
Physical Assets @ 60% depreciation	<u>2,642</u>
Total Assets	\$ 211,354

Liabilities

Accounts Payable for Qualified Campaign Expenses as of 2/1/16	\$ (224,863)
Winding Down Costs:	
Actual Winding Down Costs Paid (2/2/16 – 4/30/18)	(212,163)
Estimated Winding Down Costs (5/1/18 – 12/31/18)	<u>(\$7,690) [b]</u>
Total Liabilities	\$ (494,626)

Amounts Payable to the US Treasury

Stale Dated Checks (See Finding 5)	<u>(15,197)</u>
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Net Outstanding Campaign Obligations (Deficit) as of February 1, 2016 **\$ (298,469)**

Footnotes to NOCO Statement:

- [a] Amount includes contributions dated prior to DOI and deposited after DOI.
[b] Estimated winding down costs will be compared to actual winding down costs and will be adjusted accordingly.

Shown below are adjustments for funds received after the Candidate's DOI on February 1, 2016 through April 7, 2016, the date OMFP received its last matching fund payment.

Net Outstanding Campaign Obligations (Deficit) as of 2/1/16	\$ (298,469)
Less: Contributions Received (2/2/16 - 4/7/16)	104,475
Less: Matching Funds Received (2/2/16 - 4/7/16)	142,565
Remaining Net Outstanding Campaign Obligations (Deficit) as of 4/7/16	\$ (51,429)

As presented above, OMFP has not received matching fund payments in excess of its entitlement.

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented a preliminary NOCO statement and related work papers to the OMFP representatives at the exit conference. Subsequently, the Audit staff provided the supporting calculations for the NOCO figures. OMFP representatives did not provide comments related to this matter.

The Preliminary Audit Report recommended that OMFP demonstrate any adjustments it believed were required in connection with any part of the audited NOCO statement or provide any other additional comments.

C. Committee Response to Preliminary Audit Report

In its response to the Preliminary Audit Report recommendation, OMFP had no comments related to this matter.

Finding 2. Payments of Non-Qualified Expenses

Summary

During audit fieldwork, the Audit staff's review of OMFP's disbursements indicated that OMFP spent \$39,834 on behalf of the O' Say Can You See Political Action Committee (OPAC).⁹ Since these funds were not spent in connection with the Candidate's nomination for election, they are considered non-qualified campaign expenses. The calculated repayment to the United States Treasury at a ratio of 23.37% is \$9,309. OMFP representatives explained that OMFP was aware during the campaign that these were not qualified campaign expenses and expected OPAC's reimbursement for these expenses. The Audit staff analyzed all documentation pertaining to these disbursements and subsequent reimbursements and confirmed that OPAC reimbursed OMFP in full. Since the public funds were restored as a result of the reimbursement, the Audit staff will recommend that the Commission make a determination that no repayment is owed to the U.S. Treasury.

⁹ OPAC is a qualified multi-candidate political action committee formed on July 18, 2012. Initially OPAC supported and opposed more than one Federal candidate; however, OPAC amended its Form 1 with the Commission on June 12, 2015 to identify the Candidate as the sponsor of the Leadership PAC. OPAC has no affiliated committees.

In response to the Preliminary Audit Report recommendation, OMFP had no comments related to this matter.

Legal Standard

A. Qualified Campaign Expense. The legal standard in Finding 1 above pertaining to the qualified campaign expenses is incorporated herein.

B. Definition of Non-Qualified Campaign Expense. A non-qualified campaign expense is any expense that is not included in the definition of a qualified campaign expense (see above). 11 CFR §9034.4(b).

C. Matching Funds Used for Non-Qualified Campaign Expenses. If the Commission determines that a campaign used matching funds for non-qualified campaign expenses, the candidate must repay the Secretary of the United States Treasury an amount equal to the amount of matching funds used for the non-qualified campaign expenses. 26 U.S.C. §9038(b)(2)(A).

D. How to Determine Repayment Amount for Non-Qualified Campaign Expenses. The amount of any repayment sought under this section shall bear the same ratio to the total amount determined to have been used for non-qualified campaign expenses as the amount of matching funds certified to the candidate bears to the candidate's total deposits, as of 90 days after the candidate's date of ineligibility. 11 CFR §9038.2(b)(2)(iii).

E. Notification of Repayment Obligation. The Commission will notify a candidate of any repayment determinations as soon as possible, but no later than three years after the close of the matching payment period. The Commission's issuance of the audit report to the candidate (under 11 CFR §9038.1(d)) will constitute notification for purposes of this section. 11 CFR §9038.2(a)(2).

Facts and Analysis

A. Facts

The Audit staff reviewed OMFP's disbursement records and identified the following three payments made by OMFP on behalf of OPAC: the first payment of \$15,000 was made on May 18, 2015; the second payment of \$15,728 was made on June 1, 2015; and the third payment of \$9,106 was made on June 5, 2015. OMFP made these disbursements totaling \$39,834 to purchase social media advertising and to finance payroll on behalf of OPAC and confirmed that none of these expenses related to the presidential campaign.

Since these expenses were not made in connection with the Candidate's campaign for the Democratic Party nomination for President, they would be considered non-qualified campaign expenses. It is apparent that OMFP used these public funds to defray non-qualified campaign expenses. When calculating a repayment determination, the Audit staff routinely examines all expenses regardless of when they were made. In this instance, in accordance with 11 CFR §9038.2(b)(2)(iii), the Audit staff calculated the

ratio of repayment at 23.37%.¹⁰ Applying this ratio to the total non-qualified expenses of \$39,834, the amount of repayment to the United States Treasury would equal \$9,309.

However, based on the documentation presented by OMFP, the Audit staff confirmed that OPAC reimbursed OMFP in full on August 20, 2015. While it may have taken OPAC more than two months to reimburse OMFP, it repaid the total balance of public funds spent on non-qualified campaign expenses of \$39,834. By repaying all the borrowed funds from OMFP, OPAC restored the public funds that had been used for the non-qualified campaign expenses.¹¹ This reimbursement ensured that OMFP was able to use the public funds to pay other qualified campaign expenses or to repay the U.S. Treasury if OMFP had been in the position of carrying a surplus or it had received public funds in excess of its entitlement. Since the public funds spent on the non-qualified expenses have been restored via reimbursement from OPAC, no repayment to recoup public funds is warranted.¹²

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented this matter to OMFP representatives at the exit conference along with schedules detailing the finding. OMFP representatives reiterated that they were aware all along of the fact that these expenditures did not represent qualified campaign expenses. For that reason, OMFP requested and received OPAC's reimbursement for these expenses in full.

The Preliminary Audit Report recommended that OMFP submit any comments it deemed relevant to this matter. The Audit staff will recommend that the Commission determine that no repayment is owed to the U.S. Treasury.

C. Committee Response to Preliminary Audit Report

In its response to the Preliminary Audit Report recommendation, OMFP had no comments related to this matter.

Finding 3. Failure to Itemize Offsets to Expenditures

Summary

The Audit staff reviewed vendor refunds OMFP disclosed on Schedule A-P, Line 20 (Offsets to Expenditures (Refunds, Rebates, etc.)) and determined that OMFP did not itemize 14 such refunds totaling \$8,582. Subsequent to the audit notification, OMFP filed amended reports and materially disclosed these receipts. Since OMFP's corrective action occurred after audit notification, the matter is included in this audit report.

¹⁰ Matching funds certified as of 90 days post-DOI divided by deposits for the Primary election as of 90 days post-DOI (\$1,088,929/\$4,659,221=.2337).

¹¹ OMFP's payment of \$39,834 deemed as non-qualified campaign expenses less OPAC's full repayment of \$39,834 equals zero. Since these activities occurred prior to the DOI, they are not reflected on the NOCO statement.

¹² A repayment determination is meant for the government to recoup money that was spent in violation of the conditions of receiving matching funds, not to be a penalty. Since OMFP's funds were restored via OPAC's reimbursement, any repayment determination would be a penalty. *Kennedy for President Committee v. Federal Election Commission*, 734 F.2d 1558, 1562 (D.C. Cir. 1984).

In response to the Preliminary Audit Report recommendation, OMFP had no comments related to this matter.

Legal Standard

A. When to Itemize. Authorized candidate committees must itemize:

Any person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of \$200 within the election cycle, together with the date and amount of such receipt. 52 U.S.C. §30104(b)(3)(F).

B. Election Cycle. The election cycle begins on the first day following the date of the previous general election and ends on the date of the next general election. 11 CFR §100.3(b).

C. Definition of Itemization. Itemization of contributions received means that the recipient committee discloses, on a separate schedule, the following information:

- The amount of the contribution;
 - The date of receipt (the date the committee received the contribution);
 - The full name and address of the contributor;
 - In the case of contributions from individual contributors, the contributor's occupation and the name of his or her employer; and
 - The election cycle-to-date total of all contributions from the same contributor.
- 11 CFR §§100.12 and 104.3(a)(4).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reviewed all vendor refunds and rebates received by OMFP, and identified 14 such refunds totaling \$8,582 that were not itemized on Schedule A-P, Line 20 of OMFP's disclosure reports, as required.

OMFP filed amended disclosure reports subsequent to the audit notification and materially corrected these itemization errors. Since OMFP's corrective action occurred after audit notification, the matter is included in this audit report.

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented this matter to OMFP representatives at the exit conference along with schedules detailing the finding. OMFP representatives stated that OMFP amended its disclosure reports after the audit notification and disclosed the majority of these refunds.

The Preliminary Audit Report recommended that OMFP provide any comments that it deemed necessary with respect to this matter.

C. Committee Response to Preliminary Audit Report

In response to the Preliminary Audit Report recommendation, OMFP had no comments related to this matter.

Finding 4. Reporting of Debts and Obligations

Summary

During audit fieldwork, the Audit staff noted that OMFP failed to disclose debts and obligations to one vendor totaling \$156,019.

In response to the Preliminary Audit Report recommendation, OMFP amended its disclosure reports to materially correct the disclosure of debts and obligations on Schedule D-P (Debts and Obligations).

Legal Standard

A. Continuous Reporting Required. A political committee must disclose the amount and nature of outstanding debts and obligations until those debts are extinguished. 52 U.S.C. §30104(b) and 11 CFR §§104.3(d) and 104.11(a).

B. Separate Schedules. A political committee must file separate schedules for debts owed by the committee and debts owed to the committee, together with a statement explaining the circumstances and conditions under which each debt and obligation was incurred or extinguished. 11 CFR §104.11(a).

C. Itemizing Debts and Obligations.

- A debt of \$500 or less must be reported once it has been outstanding 60 days from the date incurred (the date of the transaction); the committee reports it on the next regularly scheduled report.
- A debt exceeding \$500 must be disclosed in the report that covers the date on which the debt was incurred. 11 CFR §104.11(b).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff used available disbursement records to reconcile¹³ the account of one of the OMFP's largest vendors, American Express. The vendor provided the credit card services that OMFP used on a daily basis to purchase various goods and services including advertising, ballot access consulting, compliance consulting, database management, digital consulting, direct mail, food and beverage, office equipment, etc. The unreported debt balances totaling \$156,019 should initially have been disclosed on Schedule D-P for the 2015 October Quarterly Report and the 2016 February Monthly Report.¹⁴

¹³ The reconciliation consisted of calculating invoiced and paid amounts for individual reporting periods in the 2015-2016 campaign cycle. The Audit staff then determined whether any outstanding debts were correctly disclosed on Schedule D-P. Each debt amount was counted once, even if it required disclosure over multiple reporting periods.

¹⁴ These reports covered periods July 1, 2015 – September 30, 2015 and January 1, 2016 – January 31, 2016, respectively. OMFP paid off the balances in the subsequent reporting periods; the 2015 Year-End Report and the 2016 March Monthly Report.

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented this matter to OMFP representatives at the exit conference and provided schedules detailing the unreported debts for each audited reporting period. OMFP did not provide comments related to this matter.

The Preliminary Audit Report recommended that OMFP provide documentation demonstrating that these expenditures did not require reporting on Schedule D-P. Absent such documentation, the Preliminary Audit Report recommended that OMFP amend its reports to disclose the unreported debts of \$156,019.

C. Committee Response to Preliminary Audit Report

In response to the Preliminary Audit Report recommendation, OMFP amended its disclosure reports to materially correct the disclosure of debts and obligations on Schedule D-P.

Finding 5. Stale-Dated Checks

Summary

The Audit staff identified 12 stale-dated checks totaling \$15,197 issued by OMFP.

In response to the Preliminary Audit Report, OMFP made a payment of \$15,197 to the U.S. Treasury.

Legal Standard

Handling Stale-Dated (Uncashed) Checks. If a committee has issued checks that the payees (creditors or contributors) have not cashed, the committee must notify the Commission of its efforts to locate the payees and encourage them to cash the outstanding checks. The committee must also submit a check payable to the U. S. Treasury for the total amount of the outstanding checks. 11 CFR §9038.6.

Facts and Analysis

A. Facts

The Audit staff's reconciliation of OMFP's bank accounts through December 31, 2016, identified 12 stale-dated checks totaling \$15,197 issued by OMFP. The checks were dated between June 9, 2015 and December 14, 2016 and had not cleared the bank as of December 31, 2017.¹⁵

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff provided OMFP a schedule of stale-dated checks at the exit conference. OMFP did not provide comments on this finding.

¹⁵ The Audit staff conducted a limited review of financial activity through December 31, 2017 in order to determine whether the stale-dated checks had been cashed by the recipients and cleared the bank prior to the issuance of this report.

The Preliminary Audit Report recommended that OMFP demonstrate that:

- The checks were not outstanding by providing copies of the front and back of the negotiated checks along with bank statements; or
- The outstanding checks have been voided by providing either:
 - Copies of the voided check with evidence that no obligation exists, or
 - Copies of the front and back of negotiated replacement checks along with bank statements.
- Absent such evidence, the Preliminary Audit Report recommended that \$15,197 be paid to the U.S. Treasury; or
- If funds were not available to make the necessary refunds, OMFP should have disclosed the contributions requiring refunds on Schedule D-P until funds become available to make such refunds.

C. Committee Response to Preliminary Audit Report

In response to the Preliminary Audit Report recommendation, OMFP made a payment of \$15,197 to the U.S. Treasury.

DRAFT



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

January 8, 2018

Thomas E. Hintermister
Assistant Staff Director
Audit Division

FROM: Erin Chlopak *EC*
Acting Associate
General Counsel for Policy

Lorenzo Holloway *LH*
Assistant General Counsel
Compliance Advice

Jennifer Waldman *JW*
Attorney

SUBJECT: Preliminary Audit Report on O'Malley for President (LRA 1007)

I. INTRODUCTION

The Office of General Counsel ("OGC") has reviewed the Preliminary Audit Report ("Proposed Report") on O'Malley for President ("Committee"). The Proposed Report contains five findings: Net Outstanding Campaign Obligations (Finding 1), Amounts Owed to the U.S. Treasury (Finding 2), Failure to Itemize Offsets to Expenditures (Finding 3), Reporting of Debts and Obligations (Finding 4), and Stale-Dated Checks (Finding 5). We concur with the findings and address questions raised by the Audit Division in its cover memorandum transmitted with the Proposed Report. If you have any questions, please contact Jennifer Waldman, the attorney assigned to this audit.

II. REFUNDED NONQUALIFIED CAMPAIGN EXPENSES DO NOT REQUIRE REPAYMENT.

The Committee spent \$39,834 on behalf of the O' Say Can You See Political Action Committee (the "PAC"), which the PAC refunded. Since the Committee spent these funds on behalf of the PAC, these funds were not spent in connection with Martin O'Malley's campaign for nomination and therefore are nonqualified expenditures. 11 C.F.R. §§ 9032.9(a), (c); 9034.4(a)(1). After a determination by the Commission that a committee used public funds on nonqualified campaign expenses, a committee, as a general matter, is required to make a repayment. 11 C.F.R. § 9038.2(b)(2). The auditors, however, are not recommending a repayment for these nonqualified campaign expenses. The auditors argue, in part, that a repayment is not required because the Committee paid the nonqualified campaign expenses before the candidate received public funds.

We agree with the approach not to recommend a repayment but we disagree with the reasoning. All expenses, even those incurred before a committee has applied for matching public funds, must be examined until the last public dollar has been spent. See 11 C.F.R. § 9038.2(b)(2)(iv). As the Court of Appeals for the D.C. Circuit has recognized, "federal funds and private contributions are commingled in the candidate's coffers," and "the regulations require repayment of unqualified expenditures regardless of whether the expenditures could properly be attributed to federal matching fund payments." *Kennedy for President Committee v. Federal Election Commission*, 734 F.2d 1558, 1562 (D.C. Cir. 1984). Therefore, it is irrelevant when the Committee paid the nonqualified expenses if its account still maintains public funds. 11 C.F.R. § 9038.2(b)(2)(iv).

We believe the Committee does not owe a repayment because the PAC refunded the funds spent on the Committee's behalf, replacing the money spent on the non-qualified expenses. The PAC's refund restored the public funds that the Committee used for the non-qualified expenses. Since the public funds were refunded to the Committee, these funds were available to pay other qualified campaign expenses or to repay the Treasury if the Committee had been in a position of carrying a surplus or it had received public funds in excess of its entitlement. See 11 C.F.R. §§ 9038.2(b)(1), (4). Therefore, any payment to the Treasury for these non-qualified campaign expenses would be a penalty. A repayment determination is not meant to be a penalty, rather it is a method of making the government whole. *Kennedy for President*, 734 F.2d at 1565 (explaining that a repayment is not a penalty but it "merely recoups [the] money expended by the candidate in violation of conditions he or she voluntarily assumed in order to receive the matching funds.").

III. AUDIT DIVISION SHOULD INCLUDE THE FINDING ON THE USE OF PUBLIC FUNDS TO DEFRAY NONQUALIFIED CAMPAIGN EXPENSES.

Although the Audit Division is not recommending a repayment for the use of public funds to pay nonqualified campaign expenses, we believe that there should be a finding in the audit report to discuss the fact that the Committee used public funds for this purpose. One of the important purposes of the public financing statutes is to allow taxpayers to scrutinize publicly funded campaigns — to know where campaign finances come from and how they are spent. *Reagan Bush Committee v. FEC*, 525 F. Supp. 1330, 1340 (D.D.C. 1981) ("Clearly, section 9009(a) evinces a purpose on the part of Congress to allow taxpayers who chose to direct a portion of their taxes to the Presidential Election Campaign Fund to know exactly how those tax monies are being spent... Yet the interests protected by PECFA do not stop at the

public's right to know how tax monies are distributed, but also embrace a concern for openness and accountability to the public in the operation of Presidential campaigns") *Reagan Bush Committee v. FEC*, 525 F. Supp. 1330, 1340 (D.D.C. 1981).¹ Therefore, we recommend that the Audit Division revise the audit report to include a finding that addresses these nonqualified campaign expenses.

¹ The court in *Reagan Bush Committee* was interpreting the Presidential Election Campaign Fund Act (general election financing statute). The statute at issue in this Proposed Report's finding is the Presidential Primary Matching Payment Account Act. However, the different statutes share a common objective of ensuring transparency regarding candidates' use of public funds.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer
May 25, 2018

Thomas E. Hintermister
Assistant Staff Director
Audit Division

FROM: Erin Chlopak *EC*
Acting Associate General Counsel
for Policy

Lorenzo Holloway *LH by JW*
Assistant General Counsel
Compliance Advice

Jennifer Waldman *JW*
Attorney

SUBJECT: Draft Final Audit Report on O'Malley for President (LRA 1007)

The Office of General Counsel ("OGC") has reviewed the Draft Final Audit Report ("DFAR") on O'Malley for President ("Committee"). The DFAR contains five findings: Net Outstanding Campaign Obligations (Finding 1), Amounts Owed to the U.S. Treasury (Finding 2), Failure to Itemize Offsets to Expenditures (Finding 3), Reporting of Debts and Obligations (Finding 4), and Stale-Dated Checks (Finding 5). We concur with the findings but have additional comments regarding Finding 2. If you have any questions, please contact Jennifer Waldman, the attorney assigned to this audit.

Finding 2 in the DFAR notes that the Committee does not owe a repayment to the United States Treasury. The Audit Division reached the same conclusion in the Preliminary Audit Report ("PAR"). To provide additional legal support for Finding 2 in the DFAR, we recommend

that the Audit Division attach our comments on the PAR. In our comments on the PAR, we explain the legal basis supporting the conclusion that the Committee does not owe a repayment.

Although the preliminary audit report may include calculations regarding future repayments, 11 C.F.R. § 9038.1(c)(1)(iii), the final audit report serves as the legal notification of any repayment determination made by the Commission. 11 C.F.R. § 9038.2(a)(2). Therefore, while the conclusion that the Committee does not owe a repayment remains the same between the PAR and the DFAR, the DFAR triggers the repayment process, and it must include the legal basis for the Commission's repayment determination. 11 C.F.R. § 9038.2(c)(1). We, therefore, incorporate our comments on the PAR by reference here and, we recommend that the Audit Division attach our comments on the PAR to the DFAR.

The DFAR does not include an explicit recommendation that the Commission determine that no repayment is owed to the United States Treasury. Since a determination that no repayment is owed is still a determination, we recommend that the Audit Division revise the DFAR to include this recommendation.